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7 Attorneys for Defendants
JOSEPH E. BARATTA AND TBIG FINANCIAL
8 SERVICES, INC.

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION
12

13 VIOLETTA ETTARE,

14 Plaintiff,

15 v.

16 JOSEPH E. BARATTA, an individual, TBIG
17 FINANCIAL SERVICES, INC., form of
business unknown, WACHOVIA
18 SECURITIES, LLC, a Delaware Limited
Liability Company, MARK WIELAND, and
19 individual, and DOES 1-25,

20 Defendant.
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Case No. 5:07-cv-04429-JW

DEFENDANTS JOSEPH E. BARATTA
AND TBIG FINANCIAL SERVICES,
INC.'S NOTICE OF MOTION, JOINDER
IN THE WACHOVIA DEFENDANTS'
MOTION TO COMPEL ARBITRATION
AND STAY PROCEEDINGS AND
PETITION TO COMPEL
ARBITRATION AND STAY
PROCEEDINGS

Date: May 5, 2008
Time: 9:00 A.M.
Judge: Hon. James Ware

Trial Date: TBD

1 **TO: PLAINTIFF VIOLETTA ETTARE, AND HER COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE that on May 5, 2008 at 9:00 a.m., in Department 1 of the
3 above-titled United States District Court, or as soon thereafter as the matter may be heard,
4 before the Honorable James Ware, Defendants Joseph E. Baratta and TBIG Financial
5 Services, Inc. (collectively referred to herein as the "TBIG Defendants") will, and hereby do,
6 join Wachovia Securities, LLC, and Mark Wieland (collectively referred to herein as the
7 "Wachovia Defendants"), in moving this Court pursuant to Sections 3 and 4 of the Federal
8 Arbitration Act (9 U.S.C. §1, *et seq.*), to compel arbitration of Plaintiff's claims against the
9 all Defendants, and to stay further proceedings in this matter until the completion of
10 arbitration.

11 This Joinder in the Wachovia Defendants' Motion and Petition to Compel Arbitration
12 seeks relief on the grounds that the TBIG Defendants are entitled to compel arbitration of
13 Plaintiff's claims under the written agreement she entered into with Wachovia, that Plaintiff
14 has rejected Defendants' written demands to arbitrate, and that Defendants have no other
15 adequate remedy to compel arbitration. The matter will be presented to the Court at the time
16 and place stated on the basis of this Notice of Motion and Joinder in Motion, the
17 Memorandum of Points and Authorities in support thereof and accompanying declarations,
18 Wachovia's Motion to Compel Arbitration and Stay Proceedings, the Memorandum of
19 Points and Authorities and in support thereof and supporting declarations, the Plaintiff's
20 Complaint, and such additional materials as may be submitted or considered at or before the
21 hearing on the Motion To Compel Arbitration and Stay Proceedings.

22
23 **PETITION FOR ORDER COMPELLING ARBITRATION AND**
24 **STAYING PROCEEDINGS**

25 Defendants and Petitioners Baratta and TBIG allege as follows:

26 1. Plaintiff Violetta Ettare ("Dr. Ettare") was a brokerage client of Wachovia
27 Securities, LLC who claims to have lost money in connection with securities transactions in
28 her Wachovia account (the "Account").

2. Defendant Joseph E. Baratta ("Mr. Baratta") is a resident of the State of Nevada. Mr. Baratta is a money manager and sole officer and director of TBIG Financial Services, Inc. ("TBIG"). Declaration Of Joseph Baratta In Support Of Motion To Compel Arbitration And Stay Proceedings ("Baratta Decl.") ¶¶1 & 2.

3. Defendant TBIG Financial Services, Inc. is a corporation organized and existing under the laws of the State of Nevada with its principal place of business in Incline Village, Nevada. Baratta Decl. ¶2.

4. Defendant Wachovia Securities, LLC ("Wachovia") is a Delaware limited liability company with its principal place of business in Richmond, Virginia, and a registered broker-dealer. Plaintiff's Complaint ("Complaint") ¶4.

5. Defendant Mark Wieland ("Mr. Wieland") was a registered representative with Wachovia during the relevant time-period, and oversaw Plaintiff's account at Wachovia. Declaration Of Mark Wieland In Support Of Defendants Wachovia Securities, LLC And Mark Wieland's Motion To Compel Arbitration And Stay Proceedings ("Wieland Decl.") ¶¶2-3.

6. Dr. Ettare and Mr. Baratta have known each other for approximately fifteen years, and Dr. Ettare has been a close friend of Mr. Baratta's sister-in-law for approximately twenty years. Baratta Decl. ¶3.

7. In 2001, Dr. Ettare's husband died. Compl.¶8; Baratta Decl. ¶4. She informed Mr. Baratta that she was the beneficiary of a one million dollar life insurance policy, and asked him to manage her account. Baratta Decl. ¶4. Mr. Baratta was not taking new clients in 2001, but in consideration for his friendship with Dr. Ettare, he agreed. Baratta Decl. ¶4.

8. In order to establish an investment management relationship with Mr. Baratta, Dr. Ettare opened a brokerage account at First Union Securities (the "Account"), which later came to be held at Wachovia Securities, and deposited \$900,000. Baratta Decl. ¶5.

9. In connection with opening the Account, on or about November 17, 2001 Plaintiff completed and executed an Account Application and an Option Account Information and Agreement (collectively, the "Agreements"). Wieland Decl. ¶¶ 4-7.

10. The Agreements have broad arbitration clauses that require Dr. Ettare to arbitrate “any controversy arising out of [her] business” with First Union/Wachovia “or this Agreement.” Declaration Of Veronica T. Hartnett In Support Of Defendants’ Motion To Compel Arbitration And Stay Proceedings (“Hartnett Decl.”) ¶6 & Exs. A-D.

11. The Agreements executed by Plaintiff appoint TBIG Financial as a third-party authorized to handle the account. The Account Application indicates that TBIG Financial had “Additional Account Control” through a limited Power of Attorney. The Option Agreement indicates that TBIG Financial has “Discretionary or Third-Party Authorization” to handle the account. *See* Wieland Decl. Ex. A; Hartnett Decl. Exs. A-D.

12. Dr. Ettare gave TBIG and Mr. Baratta authorization to act as her agents in connection with the Account, including power to buy and sell securities, and manage the investments in her Account. Baratta Decl. ¶6.

13. In or about November 2001, Mr. Baratta signed a Third-Party Trading Authorization Form from First Union Securities (the “Trading Authorization”). Baratta Decl. ¶7 & Ex. A. In this Trading Authorization, Dr. Ettare named TBIG as Plaintiff’s “Authorized Agent” to purchase and sell securities in the Account. *See* Baratta Decl. Ex. A.

14. The Trading Authorization incorporated by reference the terms and conditions of Dr. Ettare’s Account Agreements with First Union:

“The undersigned . . . authorizes TBIG Financial Services . . . as his/her agent and attorney (“Authorized Agent”) to buy, sell, . . . or trade in stocks, bonds, option contracts and any other securities on margin or otherwise **in accordance with [First Union’s] terms and conditions for my account** and risk and in my name In all such purchases, sales or trades you are authorized to follow the instructions of the aforesaid agent in every respect concerning my account with you; and except as herein otherwise provided, he is authorized to act for me in the same manner and with the same force effect as I might or could do with respect to such purchases, sales or trades.” (Baratta Decl. ¶7 & Ex. A) (emphasis added)

15. The arbitration clauses in the Agreements constitute a written arbitration agreement between Wachovia and Plaintiff that involves interstate commerce. These Agreements incorporate by reference Defendant TBIG as Dr. Ettare’s agent for purposes of managing the Account. *See* Wieland Decl. Ex. A; Hartnett Decl. Exs. A-D. The Trading Authorization, in turn, incorporates by reference the terms and conditions of the Account

1 Agreements. *See* Baratta Decl. Ex. A. Because no grounds exist for revocation of these
 2 contracts, the arbitration agreement between Plaintiffs, Wachovia and TBIG/Baratta is
 3 valid, irrevocable, and enforceable, as provided by 9 U.S.C. §2.

4 16. Plaintiff's initial Complaint, filed in or about July 2007, alleges six causes of
 5 action for fraud, breach of fiduciary duties, breach of oral contract, negligence, violations of
 6 California Corporations Code Section 25,400, *et seq.*, and violations of California Business
 7 & Professions Code Section 17,200, *et seq.* All claims are based on the same set of facts
 8 arising from transactions in her Account, and all claims — but for the breach of oral
 9 contract — are raised against all Defendants.

10 17. Section 3 of the FAA provides that when a valid arbitration agreement exists, a
 11 court shall upon application, stay all proceedings until the arbitration has been completed. 9
 12 U.S.C. §3. Because all of Plaintiffs' claims fall within the scope of a valid arbitration
 13 agreement between Plaintiffs and Wachovia, and which is applicable to TBIG and Baratta,
 14 further proceedings against all Defendants must be stayed pending arbitration.
 15 Accordingly, Defendants are entitled to an immediate stay pending the Court's
 16 determination of this petition, and, once arbitration is ordered, a further stay until arbitration
 17 is completed.

18 18. Starting in August 2007, and throughout February 2008, counsel for all
 19 Defendants sent numerous emails to Plaintiff's counsel Christopher Cooke, of Cooke
 20 Kobrick & Wu LLP, requesting that Dr. Ettare stipulate to arbitration of her claims.
 21 Declaration Of Gilbert R. Serota In Support Of Defendants' Motion To Compel Arbitration
 22 And Stay Proceedings ("Serota Decl.") ¶¶2-6. Counsel for Defendants have stated they
 23 would file a motion to compel arbitration should Plaintiff refuse to voluntarily agree to
 24 arbitration. Serota Decl. ¶¶2-6.

25 19. Plaintiff responded, through her counsel, that she would not voluntarily agree to
 26 arbitrate. Serota Decl. ¶¶3 & 6.

27 20. Although the TBIG Defendants vigorously deny Plaintiff's claims and are
 28 prepared to defend against them, those claims are subject to arbitration because they are

1 controversies arising from Plaintiff's Account at Wachovia.

2 WHEREFORE, the TBIG Defendants join the Wachovia Defendants' Petition to
3 Compel Arbitration and respectfully request that this Court issue an order:

4 1. To enforce the agreement to arbitrate the controversies that are the subject of this
5 action under the rules and procedures of the Financial Industry Regulatory Authority
6 "FINRA" (former National Association of Securities Dealers, Inc. and New York Stock
7 Exchange Dispute Resolution);

8 2. To stay all proceedings in this action against all Defendants pending
9 determination of this petition;

10 3. To stay all proceedings in this action against all Defendants pending a final
11 arbitration ruling; and

12 4. For such other relief as this Court deems proper.

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14 DATED: March 6, 2008.

15 Respectfully,

16 GILBERT R. SEROTA
17 DIANA C. CAMPBELL MILLER
18 HOWARD RICE NEMEROVSKI CANADY
19 FALK & RABKIN
20 A Professional Corporation

21 By: _____/s/
22 GILBERT R. SEROTA

23 Attorneys for Defendants JOSEPH E. BARATTA
24 AND TBIG FINANCIAL SERVICES, INC.
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